IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORIGINAL SIDE

APPEAL NO.967 OF 2005
IN
NOTICE OF MOTION NO.1729 OF 2003
IN
SUIT NO.1668 OF 2003

Darayus R. Vazifdar — Appellant
vs.
Cyrus R. Vazifdar — Respondent

ALONG WITH

APPEAL NO.968 OF 2005
IN
NOTICE OF MOTION NO.2917 OF 2003
IN
SUIT NO.1668 OF 2003

Darayus R. Vazifdar — Appellant
vs.
Cyrus R. Vazifdar — Respondent

Mr.M.M.Tally with Mr.Sagar Kadam
i/b.M/s.S.Mohadbhai & Co. for the appellant.

Mr.J.P.Cama, Senior Counsel i/b.Mr.S.S.Dube, Advocate
for the respondent.

AND ALONG WITH

APPEAL NO.1075 OF 2005
IN
NOTICE OF MOTION NO.1729 OF 2003
IN
SUIT NO.1668 OF 2003

Cyrus R. Vazifdar — Appellant
vs.
Darayus R. Vazifdar — Respondent

Mr.J.P.Cama, Senior Counsel i/b.Mr.S.S.Dube, Advocate
for the appellant.

Mr.M.M.Tally with Mr.Sagar Kadam i/b.M/s.S.Mohadbhai &
Co. for the respondent.

CORAM : R.M. LODHA &
D.G. KARNIK, JJ.

DATED : 6th December 2005

P.C.

These three appeals were taken up together by us being between the same parties arising out of Suit No.1668 of 2003.

2. The parties are real brothers; they admittedly have half share in flat No.3-A, Il-Plazzo, Little Gibbs Road, Mumbai. The relations between the brothers is not only bad but extremely bitter. The flat is not partitioned. The common area shared by them results in fights between them and their family. Cyrus Vazifdar, one of the brothers, has filed Suit seeking decree of partition in the manner shown in the plan, Exhibit P and by putting up the partition wall at the points as suggested, or in the manner thought fit by the Court and in the alternative the prayer that suit flat be sold by private treaty or by public auction after proper valuation and net sale proceeds be distributed between him and his brother Darayus in equal share.

3. Pending the aforesaid suit, two notices of motion were taken out by the parties. Notice of Motion No.1729/2003 was taken out by Cyrus (plaintiff) praying for the following reliefs:

(a) that pending the hearing and final

disposal of the suit this Hon'ble Court be pleased to direct that the internal wall be broken at Points VW, WX and YZ and thereafter a temporary partition wall be put up at Points AB, YC, WD, DE, EF, FG and GH as shown in the Plan Exhibit P to the plaint and for that purpose a commissioner or an officer attached to this Hon'ble Court be appointed to carry out the putting up of such partition so as each of the party i.e. Plaintiff and the defendant be allocated a place in the suit flat;

(b) that pending hearing and final disposal of the suit, the defendant his servants and agents be restrained by order and injunction of this Hon'ble Court from using the furniture, fixtures and household items which are in use of the plaintiff and his family and which are in his possession as set out in Exhibit Q hereto;

(c) that pending the hearing and final disposal of the suit, the defendant be restrained by an order and injunction of this Hon'ble Court from keeping any dangerous weapon revolver in the suit flat.

(d) that pending the hearing and final disposal of the suit -

(i) the defendant be restrained by an order and injunction of this Hon'ble Court from using the balcony and common area of the suit flat as a nursery and also be restrained from keeping in the common area of the house all pets like dog, parrots, cuckatoo, lovebirds or any other animals;

(ii) the defendants be directed to remove all plants from common areas as well as potted plants from the parapet and ledges of the balcony."

4. Darayus (defendant) took out Notice of Motion No.2917/2003 for leave of the Court under Section 3 of the Partition Act, 1893. The prayers made thereunder

read thus:

> (a) that the defendant be granted leave by this Hon'ble Court under Section 3 of the Partition Act, 1893 to buy the plaintiff's half share in the suit flat viz. Flat No.3-A, Il-Palazzo, Little Gibbs Road, Mumbai-3400 006 at the price determined by the Valuer (who was appointed by this Hon'ble Court by its Order dated 29th July, 2003) in terms of his report dated 22nd August, 2003;
>
> (b) that the defendant be allowed to deposit in this Hon'ble Court the amount towards plaintiff's such half share in the suit flat within such time and on such terms as may be permitted by this Hon'ble Court;
>
> (c) that this Hon'ble Court be pleased to make all necessary and proper orders in terms of Section 3 of the Partition Act including orders directing the plaintiff to withdraw the amount deposited in this Hon'ble Court by the Defendant only on the plaintiff handing over vacant and peaceful possession of the suit flat to the defendant."

5. Both the notices of motions were heard together and by the common order passed on 23rd September 2005, the learned motion Judge dismissed the notice of motion No.2917/2003 taken out by the defendant and allowed the notice of motion No.1729/2003 in part in terms of prayers (c) and (d) taken out by the plaintiff. Appeal Nos. 967/2005 and 968/2005 are at the instance of the defendant and Appeal No.1075/2005 is at the instance of the plaintiff.

6. As the dispute is between the real brothers, when the matter came up before us on 1st December 2005, we

granted opportunity to the parties to come to some amicable solution. The learned senior counsel and the learned counsel for the parties did make efforts but failed. We found that the relations between the two were so bitter that one could not stand the other. We could see from their behaviour in the Court that they were unable to live peacefully together in a flat sharing common facility and utility area. From what transpired in the Court, we formed the opinion that until the suit was decided some arrangement needed to be made though as a temporary measure whereby the plaintiff as well as the defendant and their family could have some of peace.

7. On 1st December 2005, the learned senior counsel for the plaintiff handed in the affidavit along with the annexures indicating therein that on the application made to the society viz. Il-Plazzo Cooperative Housing Society Ltd. by the plaintiff for permission to put a temporary wooden partition in the suit flat was favourably considered and the society granted permission to the proposed putting up of a wooden partition. The learned counsel for the defendant sought time to respond to the said affidavit and, accordingly, the matter was kept today. In response thereto reply affidavit has been filed by the defendant.

8. It transpires from the affidavit of the defendant

that without prejudice to his rights and contentions, the defendant is not averse to the temporary partition of the flat but he has two things to say; (one) that the plaintiff shall have to obtain necessary permission from the Bombay Municipal Corporation in that regard and (two) that the expenses for putting up the wooden partition shall be borne by the plaintiff alone.

9. Having given our thoughtful consideration to the entire conspectus of the matter, the strained and bitter relations between the two brothers and the stressful atmosphere prevailing in the flat between them and their families, it is just and proper that the suit flat is temporarily partitioned by wooden partition as suggested in paragraph 4 of the affidavit dated 1st December 2005 filed by the plaintiff and as shown in Exhibit "G" (enclosure III) annexed thereto.

10. We gave an option to the defendant as to which of the portion (yellow or pink) shown in the Plan Exhibit "G", he would like to retain. The learned counsel after seeking instructions from the defendant who is present in Court, submitted that by way of an interim arrangement, without prejudice to his rights and contentions, the defendant shall keep the portion shown in yellow colour. The learned senior counsel for the plaintiff submitted that the plaintiff was ready and willing to occupy pink portion as shown in the Plan

Exhibit "G".

11. As noticed earlier, the society has already granted permission to the plaintiff to put up temporary wooden partition.

12. If the suit flat is divided by the wooden partition as indicated above by way of an interim arrangement, the prayers (c) and (d) of the notice of motion No.1729/2003 shall not survive.

13. As regards prayers made by the defendant in the notice of motion No.2917/2003, we are of the view, these prayers cannot be granted at this stage.

14. We, thus, dispose of these three appeals by the following order:

(i) By consent of the parties, M/s.Dara B. Mistry and partners, the Architects are appointed as Court Commissioner to carry out the work of temporary partition of the suit flat by wooden partition in the manner set out in paragraph 4 of the plaintiff's affidavit dated 1st December 2005 as shown in the Plan Exhibit "G" (enclosure III). The wooden partition shall be put up from floor upto the

ceiling.

(ii) It will be for the said Architects i.e. M/s.Dara B. Mistry and partners to obtain approval from the Bombay Municipal Corporation for putting up the said wooden partition, if necessary.

(iii) All expenses for carrying out the temporary partition of the suit flat including the Architects fee and society charges shall be borne by the plaintiff subject, however, to the decision in the Suit.

(iv) Until the wooden partition is actually put dividing the two portions physically, both the parties shall keep their furniture, pots, plants and other items in their respective notionally allotted area as per the plan Exhibit G (enclosure III).

(v) The defendant shall henceforth keep his pets, birds, parrots, cockatoo, lovebirds and other animals in the area notionally allotted to him only.

(vi) We expect the Court Commissioner/

Architects to carry out the work of temporary partition by way of wooden partition in the suit flat as early as possible and preferably within three months from today.

(vii) We record the statement of the learned Senior Counsel and the learned counsel appearing for the plaintiff and the defendant respectively that the parties shall fully cooperate with the Court Commissioner (the Architects) in carrying out this order.

. No costs.

(R.M.LODHA, J.)

(D. G. KARNIK, J.)